

Update: Sexual Assault Benchbook

CHAPTER 3

Other Related Offenses

3.7 Child Sexually Abusive Activity

E. Pertinent Case Law

4. Definition of Terms

Insert the following text before the January 2004 update to page 137:

In *People v Tombs*, 472 Mich 446, 448 (2005), the Supreme Court upheld the Court of Appeals' finding in *People v Tombs*, 260 Mich App 201 (2003), that MCL 750.145c requires an intent to disseminate child sexually abusive materials to others. In upholding the Court of Appeals decision, the Court reviewed United States Supreme Court precedent addressing the issue of whether a criminal intent element should be read into a statute where it does not appear. See *Morissette v United States*, 342 US 246 (1952), *Staples v United States*, 511 US 600 (1994), and *United States v X-Citement Video, Inc.*, 513 US 64 (1994). In applying the foregoing precedent to this case the Court held:

“No *mens rea* with respect to distribution or promotion is explicitly required in MCL 750.145c(3). Absent some clear indication that the Legislature intended to dispense with the requirement, we presume that silence suggests the Legislature's intent not to eliminate *mens rea* in MCL 750.145c(3).” *Tombs*, *supra*, 472 Mich at 456-57.

The Court clarified the elements of distribution or promotion of child sexually abusive material under MCL 750.145c(3) as follows:

“(1) the defendant distributed or promoted child sexually abusive material, (2) the defendant knew the material to be child sexually abusive material at the time of distribution or promotion, and (3)

the defendant distributed or promoted the material with criminal intent.” *Tombs, supra*, 472 Mich at 465.

The Court also held “that the mere obtaining and possessing of child sexually abusive material using the Internet does not constitute a violation of MCL 750.145c(3).” *Tombs, supra*, 472 Mich at 465.

CHAPTER 3

Other Related Offenses

3.16 Indecent Exposure

D. Pertinent Case Law

Insert the following new sub-subsection on page 162 after the June 2005 update to section 3.16(D):

7. Public Exposure Not Necessary

In *People v Neal*, ___ Mich App ___, ___ (2005), the defendant exposed his erect penis to a minor female guest inside a bedroom in his home. After the jury returned a verdict of guilty, the defendant moved for a directed verdict, arguing that in order to be convicted of indecent exposure pursuant to MCL 750.335a, the exposure must take place in a public place. The trial court granted the defendant's motion for directed verdict and dismissed the charge. On appeal, the Court of Appeals overturned the trial court's finding and reinstated the defendant's conviction. MCL 750.335a prohibits "open" or "indecent" exposures that are knowingly made. MCL 750.335a does not require that "indecent" exposures only occur in a public place. Further, the Court found that case law does not require public exposure. The Court concluded that a trial court should not focus on the location of an indecent exposure but upon "the act of intentionally exposing oneself to others who would be expected to be shocked by the display." The Court concluded:

"Here, defendant's exposure clearly falls within the definition of an 'open' exposure, whereas the victim would have reasonably been expected to observe it and, she might reasonably have been expected to have been offended by what was seen. . . . Additionally, defendant's conduct also falls under the definition of 'indecent' exposure. Defendant . . . made a knowing and intentional exposure of part of his body (his genitals) to a minor child in a place (a house) where such exposure is likely to be an offense against generally accepted standards of decency in a community. . . . It was not necessary that the exposure occur in a public place because there was in fact a witness to the exposure itself.⁴ Thus, defendant's exposure could be properly categorized not only as an 'open' exposure, but also as an 'indecent' exposure for purposes of MCL 750.335a.

⁴ In light of our conclusion, the Standing Committee on Standard Criminal Jury Instructions may want to review CJI2d 20.33(4)."
Neal, supra at ___.

CHAPTER 4

Defenses to Sexual Assault Crimes

4.10 Insanity, Guilty But Mentally Ill, Involuntary Intoxication, and Diminished Capacity

D. Diminished Capacity

Insert the following text on page 234 after the quote near the middle of the page:

In *People v Tierney*, ___ Mich App ___, ___ (2005), the defendant argued that the trial court erred in prohibiting him from introducing expert testimony regarding his mental state to negate his intent. The trial court excluded the expert testimony based on the holding in *People v Carpenter*, 464 Mich 223 (2001), which removed diminished capacity as a viable defense. On appeal, the defendant argued that the Court's ruling in *Carpenter* was dicta and was therefore not binding. The Court of Appeals rejected that argument and in upholding the trial court's ruling stated:

“In our view, the *Carpenter* ruling was not dicta. Not only was it essential to the determination of the case, it was the very basis of the Court's resolution of the case. So long as case law established by our Supreme Court remains valid, this Court and all lower courts are bound by that authority.” [Citation omitted.] *Tierney*, *supra* at ___.

The Court of Appeals also rejected defendant's argument that the trial court's ruling prevented him from presenting a defense. Defendant was allowed to present non-expert testimony regarding intent.

CHAPTER 7

General Evidence

7.6 Former Testimony of Unavailable Witness

Insert the following text after the April 2004 update to page 364:

In *United States v Arnold*, ___ F3d ___ (CA 6, 2005), the Sixth Circuit expounded on the Supreme Court’s discussion of testimonial evidence in *Crawford v Washington*, 541 US 36, 51-53, 68 (2004), by examining the dictionary definitions of the terms “testimony” and “testimonial.” In *Arnold*, the court noted that “[t]he Oxford English Dictionary (‘OED’) defines ‘testimonial’ as ‘serving as evidence; conducive to proof;’ as ‘verbal or documentary evidence;’ and as ‘[s]omething serving as proof or evidence.’ . . . The OED defines ‘testimony’ as ‘[p]ersonal or documentary evidence or attestation in support of a fact or statement; hence, *any form of evidence or proof*.’ . . . (emphasis added).” The Court further noted that Webster’s Third New International Dictionary of the English Language “defines ‘testimonial’ as ‘something that serves as evidence: proof.’” In *Crawford*, the Court stated that an “accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.” In *Arnold*, the victim “made the statements to government officials: the police. This fact alone indicates that the statements were testimonial . . .” *Arnold, supra* at ___. In addition, the *Arnold* Court found that because the victim was the only witness to the incident, she could reasonably expect that her statements would be used to prosecute the defendant and to “establish or prove a fact.” The Court concluded that this finding was supported by the holding in *United States v Cromer*, 389 F3d 662 (CA 6, 2004) that a “statement made knowingly to the authorities that describes criminal activity is almost always testimonial.”